Supreme Court, U.S.
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No. 85-711

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

GILBERTO PASCO,

Petitioner,

vs.

U.S. IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a lawful permanent resident of the United States can be deprived of that liberty by a procedure that violates the right of due process guaranteed by the Fifth Amendment to the United States Constitution.

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No. 85-_____

IN THE
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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit, the Board of Immigration Appeals, and the immigration judge appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 20, 1985. This petition for certiorari is filed within six months of that date. This Court's jurisdiction is involved under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

"Amendment [V]

"No person shall . . . be deprived of life, liberty, or

property, without due process of of law . . . ."

United States Code, Title 8, Section 1153(a)(2):

"Visas shall next be made available . . . to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence."

Immigration and Nationality Act, Section 241(a)(1):

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who -- at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."

STATEMENT OF THE CASE

The petitioner, Gilberto Pasco, is a citizen of the Philippines and was admitted to the United States for lawful permanent residence on October 31, 1978, as a second preference immigrant, the unmarried son of a lawful permanent resident pursuant to Section 203(a)(2) of the Immigration and Nationality Act, Title 8 U.S.C. 1153(a)(2).

On March 2, 1982, Gilberto Pasco was served with an Order to Show Cause charging that he was married on December 30, 1976 and that he was therefore deportable under Section 241 (a)(1) of the Act as a person who did not have a valid visa at the time of entry, as well as being excludable at the time of entry as an alien seeking to enter the United States for the purpose of performing skilled or

unskilled labor without a valid labor certification. Gilberto Pasco denied these charges as well as his deportability.

At the hearing the Government, in support of these charges, introduced into evidence, over petitioner's objection, an authenticated marriage contract showing that a Gilberto Pasco married Olympia Pili on December 30, 1976. The marriage contract contained factual inconsistencies and the marriage contract was not corroborated by any other evidence. The petitioner, Gilberto Pasco, refused to answer whether he was the same Gilberto Pasco. The immigration judge found the marriage contract related to the petitioner and therefore found him deportable on the grounds that his visa was not valid at the time of entry, and thereby further on the ground that he was an immigrant

required to have a labor certification who did not have it. The Board of Immigration Appeals affirmed the decision.

Petitioner appealed his deportability to the Ninth Circuit Court of Appeals, arguing, among other things, that the finding of deportability violated his Fifth Amendment right of due process.

The Court of Appeal dismissed the appeal.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW

The question before this court is one of first impression in its interpretation

of federal immigration law. It is one of great importance to the lives of lawful permanent residents in the long-range interest of the law and the uninhibited right to be secure in life, liberty and property to not be deprived of these protected paramount interests without due process of law.

The respondent and lower court decisions ought to be reversed for the petitioner's due process rights were violated by the respondent not meeting their burden of proof in showing the petitioner, a permanent resident of the United States, is deportable by clear, unequivocal, and convincing evidence.

II

THE AUTHENTICATED MARRIAGE CONTRACT WHICH CONTAINS CONTRARY EVIDENCE FROM THAT OF PETITIONER IS NOT SUFFICIENT TO DISCHARGE THE BURDEN ON THE GOVERNMENT THAT THE PETITIONER IS THE PERSON THAT THE MARRIAGE CONTRACT RELATES TO.

When the exact date of petitioner's birth and petitioner's mother's name were in the record, there was no reason why the Government should be allowed not to bear its burden of proof but to use "apparent age" and it is a "fact that Mena is a shortened version of Filomena" to justify the disputed marriage contract, which contains discrepancies in various aspects, to deprive a gainfully employed and law abiding permanent resident of the

United States of his vested right to stay in this country.

In deportation proceedings, the INS has the burden of proving deportability by "clear, unequivocal, and convincing evidence". Woodby v. INS, 385 U.S. 276, 277, 87 S.Ct. 483, 484, 17 L.Ed.2d 362 (1966); 8 C.F.R. Sec. 242.14(a).

The various jurisdictions in the United States are divided upon the issue of whether identity of names is sufficient prima facie proof of identity of person. The Tenth Circuit in Gravett v. United States, 260 F.2d 498 (10th Cir. 1958) held, in a case of whether the defendant with a similarity of names in a prior conviction was the same person, "it is common knowledge that in many instances men bear identical names" and "it was not incumbent on the defendant to

establish that he was not the same person ...." Id. at 499. In Matula v. United States, 327 F.2d 537 (10th Cir. 1964) the Tenth Circuit in a similar case held that Government does not "discharge its total burden of proving a prior conviction by the introduction of court records pertaining to a person of same or similar name." Id. at 338.

Thus, the ruling of the Court of Appeal in the Tenth Circuit requires the Government to bear the total burden of proof in establishing that "a person of same or similar name" is the same person as one shown to have been theretofore convicted in a prior offense.

The Fifth Circuit in an action to recover oil land where there were several persons all of whom had the patentee's identical name, the court held "identity

of name is some proof of identity of person", but "its weight and effects varies much with the circumstances." The court further stated "other identification is necessary, and the burden of showing it is not shifted from the plaintiffs." Strickland v. Humble Oil & Refining Co., 140 F.2d 83, 85 (5th Cir. 1944).

Accordingly, the Tenth Circuit holds that it is common knowledge that in many instances different men bear identical names. Both the Tenth and Fifth Circuits hold that the burden of proof is totally on the Government or plaintiff to prove a document or record pertains to a person of a same or similar name.

However, the Ninth Circuit holds that "identity of a name is sufficient to establish the identity of the person in the absence of contradictory evidence."

Bayless v. United States, 381 F.2d 67, 74 (9th Cir. 1967) (involving proof of prior conviction as an element of crime of escape); Chung Young Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962) (involving proof of prior felony conviction as ground for deportation); see Corona-Palomera v. INS, 661 F.2d 814 (9th Cir. 1981) (involving name identity on foreign birth certificate to show alienage).

Clearly, the Circuit Courts have a different standard as to when the Government discharges its burden of proof in establishing that a person of same or similar name is the same person as identified on a document. There are cogent reasons inferring a legislative intent to construe the deportability provisions favorably towards a lawful permanent resident when at stake is his unhibited right

to be secure in life, liberty and property in this Country. Rosenberg v. Fleuti, 374 U.S. 449 (1963); INS v. Errico, 385 U.S.214 (1966); Woodby v. INS, 385 U.S 276 (1966). These and other cases have permeated the deportation statutes, both substantive and procedural, with a rule of strict construction. Cf. Gordon & Rosenfield, Immigration Law and Procedure, Sec. 4.1 (c).

III

EVERY REPORTED DECISION HAS NOT DECIDED THE IDENTITY OF PERSONS ISSUE AND WHO BEARS THE ULTIMATE BURDEN OF PROOF WHERE THE DOCUMENT INTRODUCED CONTAINS DISCREPANCIES FROM THE RECORD OF PROCEEDINGS.

The petitioner's record of proceedings shows two clear differences between the information in the marriage contract and information elsewhere which admittedly relates to the petitioner. The petitioner's date of birth is February 4, 1954. The marriage contract of December 30, 1976 listed the groom's age as being 22 years, 9 months old. However, the petitioner on that date was 22 years, 10 months and 26 days old. Further, the

groom's mother's first name is Mena, whereas on the purported marriage contract the groom's mother's name is listed as Filomena. The evidence in the marriage contract is equivocal, unclear, and unconvincing to show the document relates to the petitioner.

The Government in its explanation of petitioner's age being different than on the marriage contract simply stated the ages are closely approximate and petitioner's age was 22 years old, as also shown on the marriage contract. Further, the Government has summarily explained in reference to the groom's mother's name being different than that of petitioner that it is a fact that Mena is a shortened version of Filomena. The burden of proof is on the Government to prove by clear, unequivocal, and

convincing evidence that petitioner is deportable. Woodby v. INS, 385 U.S. 276 (1966).

None of the reported decisions ever dealt with the issue of identity of persons where the document produced by the Government contained material discrepancies.

Every reported decision involving the introduction into evidence of a document purported to relate to the person failed to deal with contradictory evidence contained in the document being used as evidence to prove it relates to the present person. See Corona-Palomera v. INS, 661 F.2d 814 (9th Cir. 1981) (foreign birth certificate constituted substantial evidence supporting deportability); United States v. Torres, 733 F.2d 449 (7th Cir. 1984) (Indian identity

established by Indian tribal role); Vajtauer v. Comm'r of Immigration, 273 U.S. 103 (1926) (alien found deportable who published material advocating the overthrow of government); Arriaga Ramirez v. United States, 325 F.2d 857 (10th Cir. 1963) (illegal re-entry upheld based on prior record); Gravett v. United States, 260 F.2d 498 (10th Cir. 1958) (prior conviction established sentence enhancement); Strickland v. Humble Oil & Refining Co., 140 F.2d 83 (5th Cir. 1944) (action to recover oil land where several persons had patentee's identical name); Pasterchik v. United States, 400 F.2d 696 (9th Cir. 1968) (introduction of prior judgment to support defendant's previous conviction); Matula v. United States, 327 F.2d 337 (10th Cir. 1964) (proof of prior conviction; Chase v. Crisp, 523 F.2d 595 (10th Cir.)

(1975) (issue of sufficiency of evidence presented at trial to establish a prior felony conviction was not properly presented or decided by lower court and could not be decided on appeal); Chung Young Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962) (deportation based on prior judgment of conviction); United States v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972) (name identity in a prior deportation order constituted proof beyond a reasonable doubt the person was previously deported).

Clearly the instant case does not fall within any previously reported cases. Further, as stated in the Ninth Circuit's decision, there is no indication in the record that the IJ or the BIA drew negative inferences from petitioner's invocation of the Fifth Amendment. The

contract lacked the indicia of reliability required by the Fifth Amendment to the Constitution. A marriage contract alone, that does not match the petitioner, without further corroborating evidence cannot be clear, unequivocal, and convincing evidence of petitioner's deportability.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Ninth Circuit.

Respectfully submitted,

OTTO FRANK SWANSON,
A PROFESSIONAL
CORPORATION

By _____
Max Albert Skanes
Counsel for Petitioner

N O T F O R P U B L I C A T I O N

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GILBERTO PASCO,	)	
	)	
Petitioner,	)	CA No. 84-7691
	)	
vs.	)	I&NS A37 485 096
	)	
IMMIGRATION AND NATURALIZATION SERVICE,	)	MEMORANDUM*
	)	
Respondent.	)	
	)	

Petition to Review a Decision of the Immigration and Naturalization Service
Submitted June 14, 1985**

Before: GOODWIN, NELSON, and HALL,

Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 3(f).

Gilberto Pasco seeks review of the Board of Immigration Appeal's (BIA) deportation order. Pasco contends that (1) admission of a Philippine marriage contract violated his rights to due process; (2) the finding of deportability was not supported by substantial evidence; and (3) the immigration judge (IJ) and the BIA drew improper inferences from his invocation of the fifth amendment. We affirm.

Pasco conceded alienage at his hearing leaving only deportability to be proven by clear, unequivocal, and convincing evidence. Woodby v. INS, 385 U.S. 276, 286 (1966); 8 C.F.R. Sec. 242.14(a) (1984). Title 8 C.F.R. Sec. 287.6 (1984) requires authentication of a foreign record through the following procedure: (1) personal attestation of the

copy of the document by the person in the foreign territory authorized to make the attestation; and (2) certification of the attested copy by a United States Foreign Service officer stationed in the foreign territory certifying the genuineness of the foreign signature and official position of the foreign official.

Because the marriage contract satisfies the tests for admissibility at an administrative hearing, its admission into evidence did not violate Pasco's rights to due process. Cf. Martin-Mendoza v. INS, 499 F.2d 918, 921-22 (9th Cir. 1974) cert. denied, 419 U.S 1113 (197); United States v. Rebon-Delgado, 467 F.2d 11, 13 (9th Cir. 1972) (per curiam).

The authenticated marriage contract supports the BIA's finding that Pasco was married at entry and therefore ineligible

for a second-preference visa under 8 U.S.C. Sec. 1153(a)(2). He was therefore prohibited from qualifying for a visa under 8 U.S.C. Sec. 1182(a)(20).[1/] The marriage contract constitutes substantial evidence of his excludability. See Corona-Palomera v. INS, 661 F.2d 814, 816-18 (9th Cir. 1981) (foreign birth certificate constituted substantial evidence supporting deportability); 8 U.S.C. Sec. 1105(a)(4). Finally, there is no indication in the record that the IJ or the BIA drew negative inferences from Pasco's invocation of the fifth amendment, although it would not have been improper

---

[1/] Because Pasco was not entitled to second-preference status, he was not exempted from the labor certification requirement. 8 U.S.C. Sec. 1182(a)(14). Based on Pasco's testimony that he had no independent labor certification, the IJ found that he was deportable under 8 U.S.C. Sec. 1182(a)(14) as well.

for either to have done so. See United States v. Alderete-Deras, 743 F.2d 645, 647 (9th Cir. 1984); Cabral-Avila v. INS, 589 F.2d 957, 959 (9th Cir. 1978) cert. denied, 440 U.S. 920 (1979).

AFFIRMED.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

File: A37 485 096 - Los Angeles

In re: GILBERTO PASCO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Marlon L. Sinder, Esquire
4676 Admiralty Way, Suite 632
Marina del Rey, California 90291

ON BEHALF OF SERVICE:

Robert M. Kay
General Attorney

CHARGE:

Order: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1)) - Excludable at entry under section 212(a)(20)

Sec. 241 (a)(1), I&N Act (8 U.S.C. 1251 (a)(1)) - Excludable at entry under section 212(a)(14)

APPLICATION: Termination of proceedings

In a decision dated June 10, 1982, the immigration judge found the respondent deportable on the charges set forth above. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a 30-year-old native and citizen of the Philippines who was admitted to the United States on October 31, 1980, pursuant to section 203(a)(2) of the Act, 8 U.S.C. 1153(a)(2), as the unmarried son of a lawful permanent resident. On March 2, 1982, an Order to Show Cause was issued against the respondent alleging that he had a subsisting marriage prior to his admission and that he was in fact coming to the United States to perform labor without a valid labor certification.

At the deportation proceedings, the respondent, through counsel, denied those

allegations as well as his deportability. When questioned by the Service as to his alleged subsisting marriage, the respondent took the fifth amendment privilege against self-incrimination and refused to answer. The Service then introduced into evidence the respondent's immigrant visa, visa application form, and documents in support of the visa. Over the objections of the respondent's counsel, the Service also introduced a certified copy of a marriage contract between one Gilberto Pasco and Olympia Pili evidencing their marriage in the Philippines on December 30, 1976.

After reviewing the documents submitted, the immigration judge concluded that the respondent was married before his entry into the United States, a fact which precluded his admission as a second-

preference immigrant. Since the respondent's immigrant visa was based on second-preference status, the immigration judge concluded the respondent had entered the United States without a valid immigrant visa in violation of section 212(a)(20) of the Act. Having determined that the respondent was not entitled to the exemption from the labor certification requirment of the Act accorded to second-preference immigrants, the immigration judge then considered the respondent's deportability under section 212(a)(14) of the Act. Based on the respondent's testimony at the hearing that he came to the United States to work and that he had no independent labor certification to do so the immigration judge concluded that the respondent was deportable under section 212(a)(14) as well. Deportability on

both of the above charges was found to be established by evidence that was clear, unequivocal, and convincing.

On appeal, the respondent challenges the immigration judge's finding of deportability contending that the marriage contract of Gilberto Pasco and Olympia Pili was erroneously admitted into evidence by the immigration judge because the Service failed to prove this document related to the respondent and because it was improperly "authenticated".

It is well settled that a finding of deportability will be upheld if it is supported by clear, unequivocal, and convincing evidence. See 8 C.F.R. 242.14; Woodby v. INS, 385 U.S. 276 (1966). The factual allegations enumerated in the Order to Show Cause need not be proved beyond a reasonable doubt as counsel for the

respondent would seem to suggest. Moreover, to be admissible in deportation proceedings, evidence must be relevant and probative and its use must not be fundamentally unfair. See Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

In arguing that the marriage contract does not relate to the respondent, counsel acknowledges that the name of the respondent and the name of the groom on the marriage contract appear to be the same, but explains that there are easily over one-hundred residents in the Philippines with that same name. We note, however, that no affidavits by census officials from the Philippines or other evidence was submitted to support this assertion made by counsel in his brief. The respondent also claims, as he did in the proceedings below, that his age and the

name of his mother differ from that reported on the marriage contract. He contends that although the marriage contract does not state the date of birth of the groom, it does indicate that on the date of the alleged marriage, December 30, 1976, the groom was 22 years, 9 months old. The respondent submits, however, that his birthdate is February 4, 1954, and consequently he was 22 years, 10 months old at the time of the alleged marriage. Additionally, the respondent points out that the marriage contract lists the mother of the groom as Filomena de Guzman whereas his mother's name is Mena de Guzman, as reflected on the copy of his birth registration contained in the record file.

The immigration judge considered these differences, but nonetheless concluded that the marriage contract related

to the respondent in light of the other identifying information on the document. We agree. Both the marriage contract and the respondent's birth registration list his place of birth and father's name identically. The respondent, by his own admission, was 22 years old at the time of the subsisting marriage. That his mother's name is listed as Filomena de Guzman on the marriage contract and Mena de Guzman on the birth registration is not significant in light of the fact that Mena is a shortened version of Filomena. We find no error in the immigration judge's determination that the marriage contract related to the respondent in the deportation proceedings. Additionally, we conclude that this document is relevant and has great probative value in establishing the existence of respondent's

subsisting marriage.

The record also reflects that the copy of the marriage contract between Gilberto Pasco and Olympia Pili is stamped "A Certified True Xerox Copy for the Civil Registrar-General" and is signed by Eufrosina A. Saluta, the Acting chief of the Civil Registry Section in the Officer of the Registrar-General. An official seal is also affixed next to that signature. Attached to the marriage contract is a certificate issued by the Vice Consul of the United States at the American Embassy in Manila verifying the genuineness of the signature and the official position of Eufrosina A. Saluta. We therefore conclude, contrary to the repondent's assertion's on appeal, that this document has been properly authenticated and certified pursuant to the

regulatory requirements of 8 C.F.R. 287.6.

On the basis of the record before us, we conclude that deportability has been established by clear, unequivocal, and convincing evidence. Accordingly, the appeal will be dismissed.

ORDER: The appeal will be dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES IMMIGRATION COURT

Los Angeles, California

File No.A37 485 096 June 10, 1982

In the Matter of	)	
	)	
GILBERTO PASCO	)	IN DEPORTATION
	)	PROCEEDINGS
Respondent	)	

CHARGE: I&N Act, Section 241(a)(1) - Immigrant, no valid immigrant visa.
I&N Act, Section 241(a)(1) - Excludable, no labor certification.

APPLICATION: Voluntary departure.

ON BEHALF OF RESPONDENT:

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4676 Admiralty Way, Suite 632
Marina del Rey, California 90291

ON BEHALF OF SERVICE:

Stephen Sholomson, Esq.
General Attorney
Los Angeles, California 90012

DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of The Philippines who was admitted to the United States on October 31, 1980 at Honolulu, Hawaii as an immigrant. He was admitted as a second preference immigrant, the unmarried son of a lawful permanent resident. The Government charges in the allegations of fact that the respondent had a subsisting marriage to Olympia Pili prior to his admission to the United States and that he was coming to the United States to engage in skilled or unskilled labor without a valid labor certification.

In pleading the Order to Show Cause the respondent through counsel denied that he was married to a citizen of The Philippines and denied he was coming to the United States to perform skilled or

unskilled labor without a valid labor certification. Respondent, when questioned as to his marriage, took the Fifth Amendment and refused to make any statements regarding any marriages. The Government introduced into evidence a marriage contract showing that one Gilberto Pasco was married to Olympia Pili on December 30, 1976. Respondent refused to admit or deny that this marriage contract related to him, however, it does appear that the contract relates to the respondent by reference to the respondent's age, his parents, and other identifying information. I am satisfied that this marriage contract relates to the respondent.

The respondent obtained an immigrant visa and was admitted to the United States on the basis that he was the unmarried son of Felix Pasco, a lawful permanent

resident of the United States. The respondent's marriage would take him out of the category of a second preference immigrant, and since that is the basis for the immigrant visa, I find that the respondent did not have a valid immigrant visa or other document to enter the United States at the time he applied on October 31, 1980. He would be excludable under the provisions of Section 212(a)(20). I find, therefore, that the first charge contained in the Order to Show Cause is established by evidence which is clear, convincing, and unequivocal.

Respondent, as a second preference alien, was exempt from the provisions of Section 212(a)(14) relating to the labor certification requirements.

Inasmuch as I have found that he was in fact a married alien, he must show

that he either had a valid labor certification, issued by the Secretary of Labor or that he did not have the labor certification. Since he did testify that he was coming to the United States to engage in skilled or unskilled labor, a labor certificate was necessary. I find that deportability has been established on the second charge contained in the Order to Show Cause by evidence which is clear, convincing, and unequivocal.

Respondent has applied for the privilege of voluntary departure. He is statutorily eligible for that relief and as a matter of administrative discretion that application will be granted.

ORDER: IT IS ORDERED that in lieu of an order of deportation respondent be granted voluntary departure without expense to the government on or before

August 10, 1982 or any extension beyond such date as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall become immediately effective: Respondent shall be deported from the United States to The Philippines on the charge contained in the Order to Show Cause.

_____

Reece B. Robertson
Immigration Judge